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80-1383

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MURRAY W. (DUSTY) MILLER,
Petitioner,

v.

TRANSAMERICAN PRESS, INC., TRANSAMERICAN PRESS OF TEXAS, INC., and MIKE PARKHURST,
Respondents.

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Original Petition for
Writ of Certiorari
received by Cross-
Petitioner on
January 23, 1981

QUESTIONS PRESENTED

1. May a Court of Appeals pronounce that petitioner Miller was a public figure, as a matter of law, in a libel action, when the trial court has not so held, and when such pronouncement was made before discovery was completed and before an evidentiary hearing, and while on an interlocutory appeals.

2. May a person be declared a public figure who, by his conduct, has not met the test of the United States Supreme Court that he must have assumed a special prominence in the resolution of a public question, or has voluntarily thrust himself to the forefront in a matter of public interest, and has thereby relinquished a part of his interest in the protection of his good name.

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Petitioner, as appellee in the Court of Appeals for the Fifth Circuit, respectfully prays, under Rule 19.5 of the Rules of the Supreme Court of the United States, and only in the event of a grant of Certiorari to another party, that this Cross Petition be granted to review the judgment and opinion of that Court entered in this proceedings on July 15, 1980. (See Petition for Certiorari in No. 80-1224.)

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 621 F.(2)721, and rehearing denied 628 F.(2) 932. The trial Courts order and opinion is attached as appendix I.

JURISDICTION

This petition is made conditionally under Rule 19.5, upon judgment entered in the Fifth Circuit on July 15, 1980, rehearing overruled on October 23, 1980. Petition was filed by Appellants TransAmerican Press, Inc., and Mike Parkhurst on January 21, 1981 and docketed this term as No. 80-1224.

CONSTITUTION AND STATUTES INVOLVED

Amendments 5, 7, and 14 section 1 of the United States Constitution.

> Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."
>
> Amendment VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, then according to the rules of the common law."
>
> Amendment XIV Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1292(b).

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may there upon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

STATEMENT OF THE CASE

I. Nature of the Case

Cross-Petitioner Miller brought a libel action in the U.S. District Court for the Northern District of Texas, Dallas Division, in 1972 against Respondents, Transamerica Press and Mike Parkhurst, who were respectively publisher and editor of a monthly magazine named *Overdrive.*

After certain discovery, that court on Cross Petitioner's Fourth Motion to Discover, ordered disclosure by respondents of the alleged confidential informant.

Respondents sought and were granted an interlocutory appeal to the United States Court of Appeals for the Fifth Circuit under 28 U.S.C. §1292(b) from a Memorandum and Order dated October 17, 1977. (See Appendix I)

The Court of Appeals affirmed the order of disclosure, but, in the process, held that Miller was a public figure as a matter of law.

II. **The Pertinent Facts:**

Respondents, in their June 1972 issue of *Overdrive,* wrote of Miller that he swindled the Central State Pension Fund of which he was a trustee with 15 others, of 1.6 million dollars through a fraudulent loan. At that time Miller was Fourth Vice-President of the International Brotherhood of Teamsters, and director of its Southern Conference. However the libel ran to his duties as trustee of a pension fund.

There had been no completion of discovery in the Trial Court and no evidentiary hearing when that court ordered the disclosure of confidential informants. The partial records made showed a complete absence of any conduct by Miller to invite or thrust himself into any public controversy or that he had relinquished any part of his interest in the protection of his good name, or his role as a private citizen.

Judge Politz, in his opinion, noted that the trial judge "...had as yet made no ruling on this [public or private figure] issue." Then Judge Politz proceeded to declare Miller a public figure based on the fact that Miller was a "...high ranking official of a union of tremendous importance in our economy..."

REASONS FOR GRANTING THE WRIT

The Trial Court may well be induced by the pronouncement of the Fifth Circuit to deny Cross-Petitioner an opportunity to have a jury find that he was a private figure, as he contends, and not a public figure as the Fifth Circuit has declared he was by virtue of his high office "as relates to his official duty"; or to comment upon such circumstances to the trial jury; or open the door to further discovery upon this issue or to permit the introduction of evidence which otherwise might not be admissable if that Court feels bound by the decision of the Court of Appeals that Cross-Petitioner is a public figure as a matter of law.

The age of this caes, and the age of the petitioner and certain witnesses, and the staleness of evidence dictate that petitioner take his chances in trial rather than the additional delay through appeal.

However, the pronouncement of the Fifth Circuit that one holding high office in a labor union, without more, exposes him as a public figure to the press, should not stand. It places every member of a board of directors of a large corporation, fund, association, or union, in jeopardy to the poison pen of a prejudiced press or public.

ARGUMENT

I. To Pronounce Miller A Public Figure Solely Upon The Fact Of His Holding High Office In An Important Union Denies Him A Trial By Jury Of The Issue That He Is Not A Public Figure.

Discovery has not been completed. No Motion for Summary Judgment has been filed by Cross Petitioner or respondent. A jury trial has been timely requested. Cross Petitioner has not admitted to being a public figure, and will contest the issue that he is. To be judged a private figure has substantial legal benefits to Cross Petitioner, and is a position that he holds and treasures under the law. To have his right to be considered a private individual in this suit destroyed is to deny him the right to develope evidence on the issue, thereby denying him a jury trial and a fair trial.

Cross Petitioner does not question the trial courts right to determine the issue of public official-public figure-private figure in the first instance. However, Cross Petitioner does dispute the making of this determination before full opportunity for discovery. Indeed, Cross Petitioner may discover from respondents confidential informant evidence that will prove him to be a *private* figure!

In the second instance, should a dispute or conflict arise as to the evidence bearing upon the classification to be given Cross Petitioner, then Cross Petitioner is entitled, as a matter of constitutional right to have a jury resolve that matter on an evidentiary hearing. Both rights the Fifth Circuit may have denied Cross Petitioner by its pronouncement. See: *Rosenblatt* v. *Baer,* 383 U.S. 75, 15 L.Ed.(2) 597, 86 S. Ct. 69; *Foster* v. *Laredo Newspapers, Inc.,* (Tex. Sup. Ct.) 541 SW(2) 809, fn.10.

II. The Pronoucement Was Beyond The Jurisdiction Of The Court Of Civil Appeals To Make, As The Issue Was Not One Presented To That Court Under The Interlocutory Appeal And The Trial Courts Order.

The trial court "assumed" that Miller was a pulic figure in its order of July 25th 1974, but, in its order, certified for an interlocutory appeal October 17th 1977, trial court clearly stated it had made no ruling on that issue. In its order, it found the necessity to discover the indentity of the confidential informant, whether Miller be a public or a private figure. Consequently the question of public figure versus private figure was not certified to the Court of Civil Appeals.

The jurisdiction of the Court of Civil Appeals was by statute (28 U.S.C. §1292(b)), and order of the trial court, limited to the issues certified.

> "A motion seeking a discovery ruling is addressed to the sound discretion of the District Court and [the appellate court's] function on appeal is to determine whether the trial judge abused his discretion in entering the challenged order..."

Baker v. *F&F Investment*, 470 F(2) 778, (2nd Cir. 1972); Cert den. 411 U.S. 966; *Carey* v. *Hume*, 492 F(2) 631, at P. 639, cert. dis. 417 U.S. 938.

III. The Pronouncement Denies Miller An Evidentiary Trial Upon The Issue That Such Libel Was Completely Unrelated To His Duties As A High Official In The International Brotherhood Of Teamsters; Or That His Position As A Public Figure Had Changed By Passage Of Time; Or That He Became A Public Figure As A Result Of Or After The Libel.

Miller was one of sixteen trustees of a private pension fund (eight employer representatives and eight union representatives), for truck drivers into which employers paid

funds in accordance with a collective bargaining agreement. The office of trustee of the fund was no part of his duties as Fourth Vice-President of the International Brotherhood or as Director of the Southern Conference. His duties as trustee were controlled by the funds trust instruments and his selection was not forced or required by the offices he held in the International Union. Though the fund had a large premium base, it was not as much a public matter as the business of the Ford Foundation or any other financially large trust.

The events the libel dealt with occurred in 1963-65 and Miller ceased being a trustee in 1968, and the publication of the libel herein complained of was in June 1972. These facts all raise a question that, if at any time the conduct of Miller could have been that of a public figure, it did not exist at the time of the defamatory publication.

The media cannot create its own defense by making one a public figure by its own conduct, nor may his later access to the media as a public figure subject him to the press as a public figure before or at the time of the libel. *Hutchinson* v. *Proxmire,* 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.(2) 411 at p. 431.

Furthermore, one may lose his standing as a public figure through passage of time. *Wolston* v. *Readers Digest, infra,* 61 L.Ed.(2) 450 at p. 459 fn. 7. This court there reserved such question to be resolved at another time.

IV. The Pronouncement Flies In The Face Of The Holding Of This Court In Gertz v. Welch, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. (2) 789.

In *Gertz* v. *Welch, Inc., supra,* this court stated:

> "Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own but the instance of truly involuntary public figures must be exceedingly rare. For the most part those who at-

> tain this status have assumed roles of a special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence a resolution of the issues involved. In either event they invite attention and comment."

Applying its' test to the Cross Plaintiff there, this Court refused to sweep him or every lawyer under the "public figure" concept. That attorney Gertz had long been active in his community and professional affairs and was an author of several books did not make him one. "Absent clear evidence of general fame or notoriety in the community and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life."

V. **The Pronouncement Disregards The Holding Of This Court That One Who Does Not Thrust Himself To The Forefront On A Matter Of Public Interest Or Assume A Special Prominance In The Resolution Of Public Questions Is Not A Public Figure.**

In *Time* v. *Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed. (2) 154, the facts established that respondent, Mary Alice Firestone was married to Russell Firestone, scion of one of Americas wealthier industrial families. Suit and counter suit in Florida between her and her husband resulted in a divorce following testimony that each partner had engaged in extra-marital escapades. The divorce proceedings were much in the papers and petitioner printed that Mr. Firestone was granted a divorce from petitioner on grounds of cruelty and adultery. No adultery was found however by the court in its judgment.

Time defended in part on the ground that Mrs. Firestone was a "public figure". This court there refused to so find, writing:

> "And while participants in some litigation may be legitimate 'public figures' either generally or for the limited purpose of that litigation, the majority will more likely resemble respondent, drawn into a public forum largely against their will in order to attempt to obtain the only redress available to them or to defend themselves against actions brought by the State or by others."

More to the point is the case of *Wolston* v. *Readers Digest Association* 443 U.S. 157, 99 S.Ct. 2d 61, L.Ed. (2) 450. There the defamation plaintiff who pled guilty to contempt for non-appearance before a grand jury investigating espionage activity, held not to be a "public figure" for the purposes of his suit over a book identifying him as a soviet agent indicted for espionage. The grand jury and contempt matters were much in the press. At no time was Walston indicted for espionage. This court there found that "[At] no time did he 'voluntarily thrust' or 'inject' himself into the forefront of the public controversy surrounding the investigation of Soviet espionage in the United States." After pointing out that the trial court must focus on the "nature and extent of the individual's participation"; and it must not be a merely minor participation, this Court further held that a "news worthy story is not conclusive of the public figure issue." Said this court: (61 L.Ed.(2) p. 460):

> "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom* v. *Metromedia, Inc.* 403 U.S. 29, 44, 29 L.Ed.(2) 296, 91 S.Ct. 1811, (1971) which concluded that the New York Times standard should extend to defamatory falsehoods relating to private persons if the statement involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone,* however, and we reject it again today."

Finally this court, in *Hutchinson* v. *Proxmire,* 443 U.S. 111, 61 L.Ed.(2) 411, 99 S.Ct. 2675, would not extend the cloak of "public figure" to a research behavioral scientist in the Kalamazoo State Mental Hospital, operated by the Michigan State Department of Health. He was a state employee, a professor at Western Michigan University, who had received grants from NASA, another agency, thus creating a matter of public interest. Holding there was not "injection" by Hutchinson into a public controversy, this court said:

> "He did not have the regular and continuing access to the media that is one of the accouterments of having become a public figure."

The Fifth Circuit should have rejected the public figure classification and permitted that matter to be resolved in due course of trial by the trial judge.

VI. The Pronouncement Denies Miller The Right To Be Determined A Private Citizen As Defined By The Texas Supreme Court.

The Texas Supreme Court, in *Foster* v. *Laredo Newspapers, Inc.,* 541 SW(2) 809, (1976) has also refused to define for Texas a public figure to be enlarged beyond that set out by this Court. Foster, who was a licensed civil engineer, and duly elected to the post of County Surveyor of Webb County, and an advisor to the Commissioners Court, was said by the newspaper to have platted an area which had suffered from a recent flood. It seems Foster in fact did not plat that area. Holding Foster was neither a public official or a public figure, since he "did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome", the Texas Supreme Court found him a private figure.

CONCLUSION

This writ may be denied under Rule 19.5 in the event writ is denied in cause No. 80-1224. If granted, a finding that the issue of public figure has not ripened for decision should be entered summarily.

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing Cross Petition for a Writ of Certiorari has been mailed, certified mail, return receipt requested to Mr. Charles L. Babcock, 4300 First National Bank Building Dallas, Texas 75202, and Mr. James M. Schendle, 2001 Bryan Tower, Suite 2914, Dallas, Texas 75201.

Otto B. Mullinax

APPENDIX

APPENDIX I

In The United States District Court
For The Northern District Of Texas
Dallas Division

Civil Action
No. CA 3-6695-E

Murray W. (Dusty) Miller

vs.

Transamerican Press, Inc.,
Transamerican Press of Texas,
Inc., and Mike Parkhurst

Memorandum And Order

There is now before the Court Plaintiff's Fourth Motion to Force Discovery of Confidential Sources. Having considered the motion, briefs, affidavits and oral arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law:

Findings Of Fact

This is a suit involving an article by the Defendants in the magazine *Overdrive* which allegedly libeled the Plaintiff, a former trustee of a Teamsters Union trust fund. The article alleged that an informed source told them that the Plaintiff had illegally borrowed $1.6 million from the trust fund. This case was originally filed 17 January 1973 and Plaintiff says that he has done all the discovery he can without knowing Defendant's source or sources for the article. Defendant disputes this, however, and argues that there are a number of potentially knowledgeable people who have yet to be deposed. They also suggest that the Teamster fund's files might be obtained from

the Justice Department or the Internal Revenue through a Freedom of Information Act request. Up to now the Court has carried along Plaintiff's request for the confidential source or sources in the hope that Plaintiff might be able toe stablish his case without the necessity for a disclosure. The Court is now of the opinion that this is not possible.

Conclusions Of Law

Because of some confusion that arose during the hearing on the Motion to Compel, the Court wants to make clear that it has as yet made no ruling as to whether the Plaintiff is a public figure. The Court is of the opinion, however, that such a determination is not necessary prior to compelling disclosure of Defendant's source(s).

If in fact Plaintiff is a public figure, to win the libel suit he must show that Defendant libeled him with actual malice, i.e., with knowledge that the allegation was false or with reckless disregard of whether it was false or not. *Curtis Publishing Co. v. Butts,* 388 U.S. 130 (1967); *New York Times v. Sullivan,* 376 U.S. 254 (1864). This Court is of the opinion that the identity of the source goes to the heart of Plaintiff's libel action. *Garland v. Torre,* 259 F.2d 545 (2nd Cir. 1958); *Carey v. Hume,* 492 F.2d 631 (D.C. Cir. 1974). In this case as in the *Carey* case, malice might be shown "by proof that [Defendant] in fact had no reliable sources, that he misrepresented the reports of his sources, or that reliance upon those particular sources was reckless." *Carey,* at 637.

If, on the other hand, Mr. Miller is determined not to be a public figure his burden is to show that Defendant knew or should have known that the defamatory statement was false. *Foster v. Laredo Newspaper, Inc.,* 541 S.W.2d 809 (Tex. 1976); *Houston Belt & Terminal Ry Co. v. Wherry,* 548 S.W.2d 743 (Tex. Civ. App. — Houston [1st Dist.] 1976. writ ref'd n.r.e.). To meet this burden Plaintiff might show that Defendant's

source had no connection with the Teamster trust fund or that for some other reason was not reliable. The identity of the informant would still go to the heart of the libel action. *Carey v. Hume, supra.*

In its order of 26 July 1974, the Court stated that it would not hesitate to compel discovery of Defendant's confidential sources when it appeared that the issue went to the heart of Plaintiff's case. The Court is now of the opinion that such is the case.

It is therefore ORDERED that Plaintiff's Fourth Motion to Force Discovery of Confidential Sources be and hereby is granted.

Signed this 17th day of October, 1977.

Eldon B. Mahon
United States District Judge